88-2017

Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

M/V LITSA (Ex LAURIE U), IN REM,

Petitioner,

vs.

SOUTHEASTERN MARITIME COMPANY,
PORT STEVEDORING COMPANY, INC.,
RYAN-WALSH STEVEDORING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in departing from the long-established admiralty rule that a maritime lienor must act with a "high" or "extraordinary" degree of diligence in enforcing its maritime lien against a vessel which has passed into the hands of a good faith purchaser, erred in adopting a new lesser standard of mere "reasonable" diligence, and further erred in suggesting that minimal diligence or inaction may constitute reasonable diligence.

2. Assuming for the sake of argument that "reasonable" diligence is the proper standard, whether the Third Circuit erred in finding that stevedore respondents exercised reasonable diligence in enforcing their maritime liens when respondents, who had special knowledge of the financial problems of the prior vessel owners, took no action

at all despite numerous opportunities to enforce their liens prior to the sale of the vessel to her present owners.

LIST OF PARTIES TO THE APPEAL IN THE THIRD CIRCUIT

PETITIONER/APPELLANT

M/V LISTA and its Claimant Star Warrant Shipping Corporation*

RESPONDENTS/APPELLEES

Port Stevedoring Company, Inc.

Ryan-Walsh Stevedoring Company, Inc.

Southeastern Maritime Company

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* Referring to Rule 28.1 of the Supreme Court Rules, Star Warrant Shipping Corporation has no parent, subsidiary or affiliate companies.

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M/V LITSA,

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-against-

PORT STEVEDORING COMPANY, INC., RYAN-WALSH STEVEDORING COMPANY, INC. and SOUTHEASTERN MARITIME COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 872 F.2d 554 (3rd Cir. 1989). It is printed in Appendix A, infra, at p. 38. The opinion of the U.S. District Court for the District of Pennsylvania is unreported. It is printed in Appendix B, infra, at p. 59.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered April 13, 1989. The order denying petition for rehearing *in banc* was entered on May 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Maritime Lien Act, 46 U.S.C. 971, *et seq.*, provide:

46 U.S.C. 971

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and

it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. 974

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and

mortgages, other than preferred mortgages, upon vessels of the United States.

(emphasis added)

STATEMENT OF THE CASE

(1) Background of Parties

Petitioner M/V LITSA is a Liberian flag vessel owned by claimant Star Warrant Shipping Corporation (hereinafter "Star"), based in Piraeus, Greece. Star purchased the vessel on December 8, 1982 from its prior owner Uiterwyk Lines Ltd., who traded the vessel under the name LAURIE U (A304, 158-163*). The vessel LAURIE U was operated by Uiterwyk Corpor-

* Petitioner submits the Court can determine whether or not to grant the Writ without reviewing the Court of Appeals Record. However, we have referred to the Record in the brief in the event respondents order the Record from the Third Circuit. Reference to "A" is to Appendix Volume A, which includes the trial transcript and pleadings. There will be references to the trial exhibits which are in Appendix Volume B (petitioner), Volume C (respondents Port and Ryan-Walsh) and Volume D (respondent Semco). The particular volume will be indicated by the appropriate prefix and page, e.g., B14 for a petitioner exhibit.

ation, a Florida corporation based in Tampa (hereinafter "Uiterwyk") (A178).

Prior to the purchase of the vessel by Star, the three respondents provided stevedoring and other services to the vessel. Respondent Port Stevedoring Company, Inc. (hereinafter "Port") is a stevedoring company based in Houston, Texas and conducted business in several Texas ports (A243). It provided services to the LAURIE U in the port of Houston.

Respondent Ryan-Walsh Stevedoring Company, Inc. (hereinafter "Ryan-Walsh") is a stevedoring company based in Mobile, Alabama and conducted business in about 20 U.S. Atlantic and Gulf ports (A175, 183-4). It provided services to the LAURIE U in the port of New Orleans. Respondent Southeastern Maritime Company (hereinafter "Semco") is a ship agency and stevedoring company based in Charleston, South Carolina and conducted busi-

ness in ports in Florida, Georgia and South Carolina (A80). It provided services to the LAURIE U in the port of Charleston.

(2) Summary of Claims

Claimant	Amount	Date Services Rendered	Place
Port	$111,994.71	May 13-23, 1982	Houston
	$ 46,692.26	Aug. 11-14, 1982	Houston
	$ 71,873.97	Oct. 14-20, 1982	Houston
Ryan-Walsh	$ 25,404.21	July 26-Aug. 6, 1982	New Orleans
Semco	$ 22,184.87	May 27-1982	Charleston

(C50, C134-141, D9-11)

(3) Itinerary of vessel from May 1, 1982 through April 1983 (C170-71)

Time in Port 1982	Port
Apr 27 - May 12	New Orleans
May 13 - May 23	Houston [Port's services]
May 28 - May 29	Charleston [Semco's services]

May 30 - May 31	Hampton Roads
Jun 11	Gibraltar
Jun 14 - Jun 17	Malt
Jun 18 - Jun 19	La Goulette, Tunisia
Jun 22 - Jul 3	Alexandria
Jul 11	Gibraltar
Jul 24 - Aug 7	New Orleans [Ryan-Walsh's services]
Aug 9 - Aug 14	Houston [Port's services]
Aug 29 - Sep 1	Casablanca
Sep 2 - Sep 3	Tangier
Sep 10	Alexandria
Sep 18 - Sep 22	Malta
Sep 25	Gibraltar
Oct 9 - Oct 14	Port Arthur
Oct 14 - Oct 21	Houston [Port's services]
Nov 5 - Nov 10	Casablanca
Nov 11	Gibraltar
Nov 12	El Djazair
Nov 18 - Dec 1	Alexandria
Dec 3 - Dec 7	Piraeus [Dec 5 - Star purchases vessel]
Dec 28 - Dec 30	Dunkirk
1983	
Dec 31 - Jan 5	Rotterdam
Jan 5 - Jan 12	Dunkirk
Jan 19	Las Palmas, Canary Is. Apapa, Lagos
Jan 27	Abidjan, Ivory Coast
Jan 29	Abidjan
Mar 5	Abidjan
Apr 2 - Apr 14	Philadelphia [vessel arrested]

(4) Star was a good-faith purchaser of the vessel without knowledge of any maritime lien claim

The vessel was under the Liberian

flag while trading under the names LAURIE U and LITSA. The registry for all Liberian vessels was maintained at 545 Fifth Avenue, New York, New York, where claims of maritime liens and mortgages could have been recorded on the vessel's registry to give notice of the lien claim to the public, including prospective purchasers (A334-8).

Star contracted to buy the vessel on Nov. 3, 1982 and took title to the vessel on Dec. 8, 1982 after it made a search of the vessel's Liberian registry in New York to determine whether any liens were filed against the vessel (A304-5). The Liberian authorities issued a Certificate certifying that there were no liens or encumbrances on the vessel, which certificate was required by Star before it paid the purchase price (A305, C158). Star was unaware of the respondents' claims of liens against the vessel until

after its vessel was arrested in Philadelphia on April 6, 1983. The respondents did not make any attempt to record their liens at the Liberian registry in New York, or give any notice to Star (prior to arrest) that they had lien claims against the vessel (A308-9).

(5) Prior to Star's purchase of the vessel, respondents failed to take any steps to enforce their maritime liens, despite numerous opportunities to do so and despite knowledge of Uiterwyk's financial problems

All of the respondents had a long relationship with Uiterwyk and its principals, Hendrik and Robert Uiterwyk, and had provided services to numerous vessels nominated by Uiterwyk. All respondents knew that Uiterwyk had a very bad payment record, had failed to comply with the payment terms of their stevedoring contracts, and was having particularly serious financial troubles in 1982, both

before and after they provided the services at issue in this case.

Ryan-Walsh notified Uiterwyk on numerous occasions that they would not provide stevedoring services unless monies were received prior to the loading of the vessel (B47, 83, 103-5, 107-9, 113-17) and a confidential memorandum was circulated to its top executives and directors on September 1, 1982 that:

> Uiterwyk is about to take a swan dive . . . . I would certainly recommend we have something on standby to move quickly in our interests, or perhaps consider doing something before the dam bursts . . . . (B15)
> (emphasis added)

But Ryan-Walsh did nothing to exercise its maritime lien for the stevedoring services rendered just weeks before this memorandum was issued.

Semco knew in 1982 that Uiterwyk had serious financial problems and that its

checks to Semco were bouncing in September and October 1982 (D150-73, A153-6).

Port did not receive payments as required under their contracts and threatened to arrest vessels unless payments were made (A266-7). Yet Port continued to provide services to the LAURIE U, not just once in May 1982, but a second time in August 1982, and then a third time in October 1982, all while the prior invoices remained unpaid.

Had respondents exercised any degree of diligence they would have simply filed a Claim of Lien in the Liberian registry, or arrested the vessel in any of the numerous U.S. or foreign ports at which the vessel called prior to her sale to Star. Respondents' failure to exercise diligence resulted in Star purchasing the vessel without knowledge of the liens.

Uiterwyk and its affiliated companies filed bankruptcy in the U.S. Bank-

ruptcy Court in Tampa on January 27, 1983. All respondents filed, inter alia, the same claims in the bankruptcy which they claimed in this action, and represented to the U.S. Bankruptcy Court that such claims were unsecured and did not claim they had any maritime lien as security. Port and Ryan-Walsh are on the Creditors Committee and have actively participated in and prosecuted in the Bankruptcy Court the claims which are before this Court.

(6) Proceedings below

The vessel was arrested in Philadelphia on April 6, 1983. Respondents intervened in the action and invoked the admiralty and maritime jurisdiction of the U.S. District Court for the Eastern District of Pennsylvania (#83-1614). Despite respondents taking no action to enforce their maritime liens until April

1983, the District Court found that respondents had exercised an "extraordinary high degree of diligence" (App. B, p. 67).

Jurisdiction of the Court of Appeals for the Third Circuit was invoked by the M/V LITSA pursuant to 28 USC 1291. In considering whether the District Court ruled correctly, the Third Circuit did not judge the conduct of respondents under the well-established "extraordinary high" degree standard but rather used a new lesser "reasonable diligence" standard (App. A, p. 44). The Third Circuit affirmed the judgment of the District Court in all respects except for a remand (not relevant to this petition) for reconsideration as to whether some of the items claimed give rise to maritime liens and for exclusion of certain items which it held did not give rise to maritime liens.

REASONS FOR GRANTING THE WRIT

Prior to the decision of the Third Circuit, the case law was virtually uniform that a maritime lienor must act with a "high" or "extraordinary" degree of diligence in enforcing the lien against a vessel which has passed into the hands of a good-faith purchaser, or else lose the lien through laches. The Third Circuit, however, departed sharply from the precedent and held that a maritime lienor must exercise mere "reasonable diligence," and further held that reasonable diligence was exercised even though there was inaction prior to Uiterwyk's bankruptcy despite the lienors' knowledge of serious financial difficulties.

The Writ should be granted because:

(a) the decision of the Third Circuit is in conflict with a decision of the Court of Appeals for the First Circuit and decisions of U.S. District Courts,

(b) the decision of the Third Circuit appears to be in conflict with a decision of this Court,

(c) the resolution of the conflict is of importance to the international maritime industry, and

(d) even assuming arguendo that reasonable diligence is the appropriate standard, petitioner has suffered a serious injustice because respondents did not exercise any diligence whatsoever.

* * *

(a) The decision of the Court of Appeals for the Third Circuit is in conflict with the decision of the Court of Appeals for the First Circuit in the EVEROSA, 93 F.2d 732 (1st Cir. 1937) and decisions of various District Courts

The EVEROSA (Southern Coal & Coke Co. v. Kugniecibas), 93 F.2d 732 (1st Cir. 1937) is one of the leading cases on the subject of laches and maritime liens. The vessel had called at various

U.S. Gulf ports and Norfolk between November 1933 and May 1934 before she sailed for Europe on May 17, 1934. Southern Coal supplied coal to the vessel in Mobile on Nov. 22, 1933 and again in Mobile on May 8, 1934 (nine days before the ship sailed from Norfolk to Europe). In August 1934 the vessel was sold to Latvian owners who renamed her and transferred her to Latvian registry. The lienor Southern Coal arrested the vessel immediately upon its return to American waters in November 1933. The Court of Appeals held that the November 1933 lien was barred for laches (but allowed the May 1934 lien). It noted that the coal company between November 1933 and May 1934 had six opportunities to arrest the vessel at various American ports (including the second return trip to Mobile when the November claim was already six months old) and, despite the fact it had

not been paid for the November 1933 coal supply, it furnished coal again in May 1934 on further credit to the owners. (Just as Port provided additional services to the LAURIE U in August and October 1982 even though the May 1982 services were not paid for.) The Court of Appeals stated, 93 F.2d 735, as follows:

> It is of the very essence of the lienor's rights that they shall not be slept upon. Being undisclosed and cutting under titles subsequently acquired in good faith and without notice of them, a high degree of diligence is demanded in their enforcement.
>
> . . . .
>
> The [EVEROSA] called at various gulf ports of this country half a dozen times between the first coaling and the second. There was unquestionably a reasonable opportunity to enforce the lien.
>
> (emphasis added)

The requirement of a high degree of diligence was recognized in a related case, The EVEROSA, (Swan & Sons, Inc. v.

Kugniecibas), 20 F. Supp. 8 (E.D.N.Y. 1937). The District Court noted that the ship chandler had furnished supplies in Norfolk in January 1934 and could have arrested the ship at various U.S. Gulf ports during March, April and May and upon her return to Norfolk in May 1934 when the claim was four months old, but failed to do so. The Court stated at 20 F. Supp. 11, as follows:

> The presence of the [EVEROSA] in Norfolk on May 16 and 17, 1934, is not so easily overlooked. Over three months had elapsed since the supplies were delivered; the vessel was known to be of foreign registry, and to be engaged in peripatetic pursuits. The claimant is a ship chandler and is familiar with the hazards of that calling. This definite display of indifference, touching the opportunity to enforce its liens through appropriate action, cannot fail to count heavily against it, in balancing the equities.
>
> (emphasis added)

U.S. District Courts have followed the dictates of the EVEROSA cases. In

McLaughlin v. Dredge GLOUCESTER, 230 F. Supp. 623 (D.N.J. 1964), the Court held at 630:

> Where a maritime lien is to be enforced to the detriment of a bona fide purchaser without notice, the libellant must act with extraordinary diligence. As against such a purchaser such lien will be lost in equity after the lapse of a much shorter period of time under the doctrine of laches, than under analogous limitation statutes.
> (emphasis added)

In John W. Stone v. MISS BERN, 663 F. Supp. 773 (S.D.Ala. 1987), the Court found that the lienor was guilty of laches for failing to enforce a maritime lien within a 2-1/2 month period between the rendering of services and the sale of the vessel. The Court held at 778:

> "Plaintiffs are required to act with 'extraordinary diligence' to enforce a maritime lien against a bona fide purchaser without notice." Trivizas v. Tanjong Shipping Company, [1982 AMC] at 2523, McLaughlin v. Dredge Gloucester, supra. The Everosa, 93 F.2d 732, 1938 A.M.C. 82 (1st Cir. 1937); Merchants & Marine Bank v. F/V T.E. WELLS, 289 F.2d 188, 1961

> A.M.C. 1042 (5th Cir. 1961). The claim will lapse in a much shorter time and the court will undertake a more rigid scrutiny of the circumstances of the delay in cases where the vessel is in the hands of a bona fide purchaser as opposed to cases where there has been no changes in ownership. The Key City, 81 U.S. (14 Wall.) 653,20 L.Ed. 896 (1871). (emphasis added)

Even the District Court below enunciated the standard of diligence as "extraordinary high" (App. B, p. 67).

We also refer to a case decided over 140 years ago, The ELIZA JANE, 8 F. Cas. 488 (Case No. 4,363) (D.Mass. 1847), in which the Court rejected a six-month old lien claim.

The leading maritime law commentators are in accord with these Court decisions. Gilmore & Black in their Law of Admiralty, (2d Ed.), state at 767:

> It is a fair conclusion that good faith purchase without notice will bar all preexisting liens more than a few months old and that even such liens will be barred unless the lienors proceed with the utmost

> diligence (not, however, being required to pursue the ship in foreign ports).
>
> (emphasis added)

2 Benedict on Admiralty, states in para. 62:

> As a general rule, those liens arising under the Federal Maritime Lien Act and any other liens not already subject to a fixed statute of limitation should be enforced with a high degree of diligence since "courts do not look with favor on delays", except if proven reasonable.
>
> (emphasis added)

The EVEROSA cases were decided over fifty years ago. Vessels can now be readily traced and their position established within a day or two through such sources as Lloyd's Watch Service and other sources of intelligence such as the ship listings in the Journal of Commerce, all well known to the maritime industry and maritime lawyers and the respondents, who knew about and subscribed to these sources of shipping intelligence and used

maritime lawyers. (A213, 227-8, 271-4; B13-14; C145-50; D175-8.) Therefore, we submit the time allotted to a lien claimant to exercise the "extraordinary" degree of diligence should be substantially reduced from the time periods used in the EVEROSA cases to reflect the changes in worldwide communications and intelligence. The respondents are all large companies with access to maritime lawyers and shipping intelligence. The recent decision in the John W. Stone case, supra, gives implicit recognition to the speed with which a diligent lienor can and should act in its enforcement of lien claims more than a few months old when there is a bona fide purchaser of the vessel.

The difference between "reasonable diligence" and "extraordinary diligence" is not a matter of semantics but has real meaning. For instance, Black's Law

Dictionary (4th Ed. 1968) defines "diligence" as "[p]rudence; vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety." The text goes on to explain the differences between the three types of diligence:

> The law recognizes only three degrees of diligence: (1) Common or ordinary, which men, in general, exert in respect of their own concerns; the standard is necessarily variable with respect to the principle. (2) High or great, which is extraordinary diligence, or that which very prudent persons take of their own concerns. (3) Low or slight, which is that which persons of less than common prudence, or indeed of no prudence at all, take of their own concerns.
>
> (emphasis added)

The cases cited by the Third Circuit do not support the new diminished standard of diligence. The BOLD BUCCLEUGH, 7 Moore, P.C. 267 (1852), is an English case decided nearly 140 years ago. Since

that time, the United States Courts, as set forth above, have enunciated a standard of extraordinary or high degree of diligence. Moreover, as noted by Gilmore & Black, supra, at 764, the English Court in the BOLD BUCCLEUGH:

> [D]id in fact enforce a collision lien against a ship which had passed into the hands of a purchaser assumed to be in good faith and without notice, but in favor of a lienor who had acted with extraordinary diligence.
>
> (emphasis added)

The reference to "reasonable diligence" in Merchants and Marine Bank v. T.E. WELLS, 289 F.2d 188 (5th Cir. 1961) at 190, is in the context of an assertion by one of the parties:

> Either alone, or as an ingredient of laches, the Bank asserts also that, as a matter of law, the lienor failed to exercise reasonable diligence . . .
>
> (emphasis added)

The Fifth Circuit did not specifically hold that reasonable diligence was the

proper test. Indeed, the issue of whether the diligence standard was "reasonable" or "extraordinary" was not an issue in either of the above two cases relied on by the Panel. However, if the standard in the Fifth Circuit is one of "reasonable" diligence as suggested by the Court below, we submit there is a further conflict then with the First Circuit and the District Court decisions cited above which requires resolution by this Court.

(b) The decision of the Third Circuit is in apparent conflict with a decision of this Court

In The KEY CITY, 81 U.S. 653 (1871), the Court summarized various rules of the law of laches and maritime liens, including, at 660:

> That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence [laches] will be held valid under shorter time, and a more rigid scrutiny of

> the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.
> (emphasis added)

The use of the words "shorter time" and "rigid scrutiny" suggests that a lienor must not just exercise "reasonable" diligence, but take prompt action to enforce the lien. We note the Courts in McLaughlin v. Dredge GLOUCESTER, supra, and John W. Stone v. MISS BERN, supra, relied on the KEY CITY in deciding that a maritime lienor must exercise extraordinary diligence in enforcing his lien. The Third Circuit's decision is in apparent conflict with the KEY CITY.

(c) The issue is of importance to the international maritime industry

The resolution of the conflicting court decisions on laches and maritime liens is not merely of academic interest, but is rather a matter of practical importance to the maritime industry.

Maritime liens are "undisclosed and cut . . . under titles subsequently acquired in good faith . . . ." EVEROSA, 93 F.2d 732 (1st Cir. 1937) at 735. The slackened standard of diligence enunciated by the Third Circuit effectively lengthens the time in which maritime liens survive against vessels which have passed into the hands of good-faith purchasers. This, of course, greatly increases the risk to vessel buyers that unpaid and unknown lienors whose liens originated months and years earlier will appear and seize the vessel just purchased. The high degree of diligence standard, on the other hand, reduces the time in which maritime liens survive, which accordingly reduces the risk and potential costs to vessel buyers.

The uniformity of the law on this issue is also important to maritime lienors, including stevedores. As it

stands now, a lienor who arrests a vessel in Philadelphia will be held to a different and lesser standard of diligence than one who arrests the same vessel in Boston or New York or Mobile.

M/V LITSA submits the admiralty law must be uniform with respect to enforcing maritime liens against vessels have been sold to good-faith purchasers.

(d) Even assuming arguendo that reasonable diligence is the appropriate standard, petitioner has suffered a serious injustice because respondents did not exercise any diligence whatsoever

Even a "reasonable diligence" standard required the respondents to take some action to protect and enforce their liens. Respondents, however, took no action prior to the sale of the LITSA to Star and petitioner suffered severe prejudice as a result. They only took action after the bankruptcy when the horse was already out of the barn.

Prior to the sale of the vessel, all respondents were on notice of the serious financial problems of Uiterwyk. Respondent Ryan-Walsh provided services in late July/early August 1982 in New Orleans. Shortly thereafter, its top officers and directors were advised on September 1, 1982 by the officer in charge of their New Orleans office (which rendered the services involved in this litigation) that "Uiterwyk is about to take a swan dive" and that they should "consider doing something before the dam bursts" (B15; A191-3). Yet nothing was done. As of July 31, 1982 (at the very time they were providing the services involved in this litigation) a Ryan-Walsh analysis (B79) showed outstanding invoices for Uiterwyk vessels of $627,148.53, of which more than two-thirds were more than 60 days old and almost half more than four months old, despite the contract require-

ment that 80% be paid on presentation of invoices and the balance within 60 days. Ryan-Walsh continually throughout 1982 threatened to stop work unless some payments were received and indeed issued orders not to work and accused Uiterwyk of repeatedly breaking promises (B47, 83, 103-5, 107-9, 113-7).

Respondent Semco provided services to the vessel in Charleston in May 1982. Thereafter, Uiterwyk's checks to Semco bounced, yet Semco took no steps to enforce its lien (D170, 173). On five occasions prior to November 1982, Semco deposited Uiterwyk checks which were rejected by the bank. As far back as August 1981 Semco knew that its bank had refused to permit Semco to borrow against Uiterwyk's accounts receivable (D150, 152). On June 14, 1982, a few weeks after it rendered the services involved in this litigation, its outstanding

receivables from Uiterwyk totalled $564,120.22, which was $214,120.22 in excess of what they could permit to be outstanding (D154). In August 1982 Semco threatened the arrest of vessels due to the "continued failure" to pay accounts receivable (D166). In September and October 1982 checks bounced.

Respondent Port knew that Uiterwyk had serious financial difficulties since the Iranian revolution in 1979 and that matters worsened in 1982, that it was not paying its bills and that threats were made by Port, including threats that they would refuse to do any more work and arrest vessels unless they received payment (A266-8, 285-9). According to monthly statements submitted by Port to Uiterwyk during 1982 (B216-27) and Port's running account (B228-35), indebtedness to Port was increased from $800,000 in

1980 to more than $1,000,000 in 1982 without any substantial reduction, and Port permitted the individual stevdoring invoices to regularly age to six to seven months, even though its contract required 80% payment on completion of services, a contract requirement which was never honored. Yet Port continued to provide services, including services to the LAURIE U, not once in May 1982, but a second time in August, and then a third time in October 1982, all while the prior invoices remained entirely unpaid (as well as many other invoices for other vessels).

* * *

Despite the knowledge of Uiterwyk's financial problems, respondents sat back and did nothing. Port even provided services on two more occasions. What should respondents have done?

(i) Recording of maritime lien

The Liberian Maritime Law in Section 111 expressly provided for the recording of Notice of Claim of Lien (in language almost identical to its U.S. counterpart) as follows:

> (1) The Commissioner or his duly authorized agent shall upon the request of any person record notice of his claim to a lien upon a registered vessel, together with the nature, date of creation, and amount of the lien and the name and address of the person.

The failure to record a maritime lien has been cited by the Courts as an important factor in determining laches. The JOHN CADWALDER, 99 F.2d 678, 680 (3rd Cir. 1938); John W. Stone v. MISS BERN, 663 F.Supp. 773, 779-80 (S.D.Ala. 1987); Waterways Marine, Inc. v. Brooks Liquid Transport, 291 F.Supp. 703, 704-5 (N.D. Ill. 1968); Dixie Machine v. M/V ANDINO, 1983 A.M.C. 1166, 1168 (S.D.Fla. 1982), Tagaropulos, S.A. v. SS SANTA PAULA, 502

F.2d 1171, 1172-3 (9th Cir. 1974); The NIKITA, 62 F. 936-7 (5th Cir. 1894). Had the liens been recorded, notice would have been given to the innocent purchaser Star.

(ii) Arrest of vessel

All respondents had numerous opportunities to arrest the vessel at both U.S. and foreign ports prior to the purchase by Star in December 1982, yet failed to do so. Of particular application to the special circumstances of the case at bar is The PRILLA, 21 F. Supp. 383 (D.Mass. 1937). The lienor was a ship storage and repair company that provided services to a boat during the period May 1, 1935 to July 8, 1936. It had received a payment on account in June 1935. On July 3, 1936 another check given to the lienor "was returned from the bank unpaid." The vessel was sold in early November 1936. The lienor had

difficulty finding where the boat was, but knew where it was in September 1936 yet did not arrest it. The Court, in rejecting the lien, held as follows at 384:

> Whether or not the libelant had been extending credit to the boat or to Johanson personally, it was certainly placed on notice at this time that the credit of Johanson was questionable. It was its duty then to act promptly to protect its lien.
>
> . . . .
>
> The maritime lien, being a secret one, is one that should be enforced without unnecessary delay. As between the original parties, Johanson would not be heard to claim that the libelant was not diligent in its efforts. Since the rights of the third person have intervened, the lien will be regarded as lost. The person in whose favor it had existed has had a reasonable opportunity to enforce it, and has not done so. [Citation omitted.] Where either Leonard or the libelant is to sustain the loss, in good conscience and equity, the loss ought to be borne by the one who placed himself in a position to suffer it, where the other has been guilty of no negligence.
>
> (emphasis added)

(iii) Demanded payment up-front

Respondents could have insisted on immediate payment or refused to do the work. This is particularly applicable to Port who, despite not being paid for the May 1982 services, rendered additional services in August. Then, despite not being paid for its May or August services, Port furnished more services in October 1982.

* * *

Instead of registering their liens or arresting the vessel or refusing to continue to provide services, respondents admitted they were content to wait and hope to be paid by Uiterwyk. However, this is no excuse for failure to move diligently to register or enforce their liens. OWYHEE, 66 F.2d 399 (2d Cir. 1933) at 401.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York
June 8, 1989

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1362

BERMUDA EXPRESS, N.V., SOUTHEASTERN MARITIME COMPANY, PORT STEVEDORING COMPANY, INC., RYAN-WALSH STEVEDORING COMPANY, INC., NRS FINANCIAL CORP., ASSIGNEE OF MALONE MARINE GROUP, INC., ZALESKY, MARVIN d/b/a/ SEASIDE MARINE SUPPLY OF HOUSTON, CHARLES L. MOLHO, d/b/a MANHATTAN SHIP SUPPLY and THURMOND SUPPLY CO., INC.

v.

M/V LITSA (Ex. LAURIE U) IN REM,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 83-1614)

Argued December 6, 1988

Before: SLOVITER and BECKER,
Circuit Judges, and
BARRY, *District Judge*•

(Opinion filed April 13, 1989)

• Hon. Maryanne Trump Barry, United States District Court for the District of New Jersey, sitting by designation.

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Ryan-Walsh Stevedoring Company, Inc.

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

ISSUES

The appellant vessel in an in rem action appeals from the district court's final adjudication and judgment awarding three stevedoring companies the full amount of their claims based on maritime liens for unpaid invoices for stevedoring services provided to

the vessel before it was sold to its present owner. The principal issue on appeal is whether the claims of the stevedore lienors were barred by the equitable doctrine of laches. The conflicting interests involve, on one hand, those of maritime lienors whose services are essential for the smooth functioning of maritime commerce and, on the other hand, those of bona fide purchasers in good faith of vessels which may be subject to such liens. We must also decide the scope of "necessaries" which give rise to maritime liens under 46 U.S.C. § 971 (1982).

II.

FACTS

Most of the facts relevant to this appeal are not in dispute. Appellees, Port Stevedoring, Inc. (Port), Ryan-Walsh Stevedoring Company (Ryan-Walsh), and Southeastern Maritime Company (Semco), are in the business of supplying stevedoring services to vessels at various ports in the southern portion of the United States. In 1982, Uiterwyk Corporation (Uiterwyk), the general agent for Uiterwyk Lines, Ltd. which owned the vessel, contracted with appellees to provide stevedoring services for vessels nominated by Uiterwyk. This contract covered the vessel involved in this litigation, then known as the M/V LAURIE U, which sailed under Liberian registry. The contracts all called for payment of 80% of the amount due for services rendered upon completion of such services for each vessel and presentation of an invoice. Under the Port and Semco contracts, the balance became due a reasonable time after presentation of duly documented bills, while under the Ryan-Walsh contract final payment was due within sixty days after the presentation of such bills.

Semco provided services to the M/V LAURIE U on May 27 and 28, 1982 in Charleston, giving rise to a claim of $22,184.87. Ryan-Walsh provided services to the M/V LAURIE U on July 26-August 6, 1982 in New

Orleans, giving rise to a claim for $25,404.21. Port provided services to the M/V LAURIE U in Houston on three occasions in 1982, May 13-23, August 11-14, and October 14-20, giving rise to claims for $112,994.71, $46,692.26, and $71,873.97 respectively.

On October 21, the M/V LAURIE U left United States waters and did not return until April 2, 1983. In the interim, two significant events took place. On December 8, 1982, Uiterwyk Lines, Ltd. sold the M/V LAURIE U to Star Warrant Shipping Corp. (Star), a shipping company operating out of Piraeus, Greece. In the contract of sale, Uiterwyk Lines, Ltd. warranted to Star that there were no maritime liens against the vessel, and Star's search of the Liberian registry in New York revealed that no claims had been filed against the ship. Star renamed the vessel M/V LITSA. Shortly after the sale, on January 27, 1983, Uiterwyk, the general agent, filed a petition in bankruptcy in the Middle District of Florida.

Upon learning of the bankruptcy, appellees filed individual claims in the bankruptcy court and contacted Lloyds Watch of London to determine the status of Uiterwyk vessels which they had serviced. Lloyds informed appellees of the purchase of the M/V LAURIE U and the name change, and continued to track the vessel's movements until it returned to United States waters on April 2, 1983. Bermuda Express, another claimant who has since settled with Star, arrested the M/V LITSA in the Port of Philadelphia on April 6, 1983. The district court had jurisdiction over this suit in admiralty under 28 U.S.C. § 1333 (1982).

Appellees intervened as plaintiffs and proceeded to trial against the M/V LITSA on their claims. After a bench trial, the district court determined that all three appellees had acted with the extraordinary degree of diligence required to preserve their maritime liens, and

that neither their participation in the bankruptcy proceedings nor their failure to file notice of their maritime liens waived their right to assert those liens. The court entered the following judgments which represent the full amounts of the claims and prejudgment interest: Port, $324,185.31; Ryan-Walsh, $35,588.16; Semco, $31,078.28.

The vessel appeals, arguing that the district court erred in its analysis of the laches issue, that its finding of no waiver was clearly erroneous, that some of the claims were not necessaries giving rise to maritime liens, and that the award of prejudgment interest was not warranted.

III.

LEGAL PRINCIPLES

A.

Our standard of review on the laches issue has various components. We review factual findings such as length of delay and prejudice under the clearly erroneous standard; we review the district court's balancing of the equities for abuse of discretion; and our review of legal precepts applied by the district court in determining that the delay was excusable is plenary. *See Churma v. United States Steel Corp.*, 514 F.2d 589, 592-93 (3d Cir. 1975).

The statute governing maritime liens provides that persons supplying various enumerated services or "other necessaries" to a vessel are entitled to a maritime lien on the vessel "which may be enforced by suit in rem." 46 U.S.C. § 971.[1] The statute does not

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1. The text of the relevant statute provides in full that:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of

require maritime lienors to file claims of their liens. At common law maritime liens had historically been considered secret liens, good even against a good faith purchaser of a ship without notice of the lien's existence. *See Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920); G. Gilmore & C. Black, The Law of Admiralty 588 (2d ed. 1975). Both at common law and under the statute, however, maritime liens may be lost by laches in their prosecution. *See* G. Gilmore & C. Black at 588.

In *The Bold Buccleugh*, 7 Moore, P.C. 267 (1852), the English Privy Council case which serves as the original authority on the issue, G. Gilmore & C. Black at 595, the court enforced a maritime lien against the ship although it had since been sold; the court, however, noted that the lien may be lost "by negligence or delay where the rights of third parties may be compromised." *Id.* at 285.

Shortly thereafter, the United States Supreme Court enunciated a similar principle. In *The Key City*, 81 U.S. (14 Wall.) 653, 660 (1872), the Court stated that "laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence;" that there is no "arbitrary or fixed period of time" for its operation but that the determination that a lienor was guilty of laches would "depend on the peculiar equitable circumstances of that case;" and that "where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the circumstances of

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the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971.

the delay, than when the [party claiming laches] is the owner at the time the lien accrued."

The parties dispute whether a maritime lienor must exercise "extraordinary diligence" in order to preserve a claim against a bona fide purchaser, *see McLaughlin v. Dredge Gloucester*, 230 F. Supp. 623, 630 (D.N.J. 1964); *see also* G. Gilmore & C. Black at 767 & n.387, or whether "reasonable diligence" is sufficient, *see The Bold Buccleugh*, 7 Moore, P.C. at 285 ("where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come"). While it is possible that the difference in semantics would not be dispositive since diligence by its very nature requires "steady, earnest, attentive, and energetic application and effort," Webster's Third New International Dictionary (1976), we believe that the lienor should be held to a "reasonable diligence" standard. *See Merchants & Marine Bank v. The T.E. Wells*, 289 F.2d 188, 190 (5th Cir. 1961) (applying a reasonable diligence test). The lienor must take such steps as are appropriate under the circumstances. The district court used the standard most favorable to the vessel and found nonetheless that the lienors exercised the "extraordinary high degree of diligence" required to preserve and enforce the liens. App. A at 376. If we conclude that there is the requisite support for a conclusion of reasonable diligence, we are bound to affirm.

B.

Appellant argues that in considering the diligence of the lienors in this case, we need look no further than the analysis used by the courts in the two *Everosa* cases decided half a century ago. In the first *Everosa* case, *The Everosa (Southern Coal & Coke Co. v. Kugnlecibas)*, 93 F.2d 732 (1st Cir. 1937), the libelant,

Southern Coal & Coke Company, had provided coal to the vessel at issue on November 22, 1933 and May 8, 1934 for which it had received only partial payment. Shortly after the second coaling, the ship sailed for foreign waters and did not return until November 1934, at which time Southern libeled the ship. *Id.* at 733-35. While it had been in foreign waters, it was sold to a bona fide purchaser.

The district court found for the ship against the lienor on both claims on the ground that no lien arose, a holding rejected by the court of appeals. The appellate court then considered the ship's laches defense, apparently as a matter of first impression, and held that laches did not bar enforcement of the lien for the second coaling because the ship left the United States nine days after the coaling and "[a]bsence of the vessel from the country operates to relieve the lienor to some extent from the imputation of laches." *Id.* at 735. Although the court noted that there was evidence that the ship had returned to this county before the voyage on which she was libeled, *id.*, it nonetheless held "there was clearly no laches." *Id.*

The question of the enforceability of the lien for the first coaling was, the court noted, "very close." *Id.* It concluded that that lien was barred by laches because the ship had "called at various gulf ports of this country half a dozen times between the first coaling and the second," and thus the lienor "unquestionably" had "a reasonable opportunity to enforce the lien." *Id.* The court also noted that the lienor "knew or could easily have discovered" that the vessel at the time of the coalings was held by the party receiving the coal under charter and not as owner, "and that rights of third persons might be affected." *Id.* at 735-36.

The second *Everosa* case, *The Everosa (Swan & Sons v. Kugniecibas)*, 20 F. Supp. 8 (E.D.N.Y. 1937), involved claims filed by companies which had supplied

the vessel in Norfolk, Virginia, in February 1934 and in New Orleans in April 1934 before it sailed for foreign waters in May 1934. In this case, however, the lienors did not file their libels until 1937, although the ship had returned to United States waters twice in the interim. The court held that inasmuch as the company supplying the vessel at Norfolk had an opportunity to enforce its lien when the vessel returned to Norfolk in May 1934 before it sailed abroad, and that the creditors (including the libelant) were notified of the bankruptcy proceeding of the operator which was initiated in June 1934, *see id.* at 11, both of which events were prior to the transfer of title of the ship in August 1934, the balance of equities required dismissal of the libel.[2] On the other hand, the court held that the second lienor was not barred by laches because the ship sailed abroad within a month of its supply services, and, although the ship returned to the United States at various times, it did not return to New Orleans during those visits. It held that failure to take advantage of those opportunities for affirmative action "does not fatally portray lack of diligence." *Id.* at 13.

Appellant urges that the *Everosa* cases mandate a finding that Semco, Ryan-Walsh, and Port did not exercise the requisite diligence in enforcing their liens. Although some of the facts in the *Everosa* cases are analogous to the M/V LAURIE U situation, all of the cases stress that the question of due diligence is one peculiar to the facts of each case. For this reason, it is not particularly useful to review the facts of the many other cases referred to by appellant and the distinguishing factors pointed out by appellees. We accept the legal principles from the *Everosa* cases that lienors are not required to attempt to enforce their

2. In this case, unlike in the first *Everosa* case, the court stated that the company ordering supplies was both owner and charterer. 20 F. Supp. at 9.

liens in foreign waters and that the existence of a reasonable opportunity for the lienor to arrest the vessel before the purchase is an important factor in the laches analysis.

However, the fact that it would have been possible or even feasible to locate and arrest the vessel at a port in the United States is not dispositive of the question of whether or when the appellees in this case should have done so. The custom of the shipping industry, for example, must also inform the analysis of what constitutes diligence under the circumstances of a given case.

The arrest of a vessel is a remedy of last resort, and one which has the potential to seriously disrupt the flow of maritime commerce. Therefore, we decline to establish a firm rule which would require a maritime lienor to arrest a vessel, particularly if there are available other reasonable methods, consistent with industry custom, to secure payment. The relevant consideration instead is what would have been the commercially reasonable practice. Components of diligence thus include industry custom, the amount of the lien, the pattern of dealing between the parties, and whether the lienor had information that the interests of a third party would likely be adversely affected by its failure to act.

Appellant argues that we should also consider whether the lienors filed their claims on the ship's register. It claims that the lienors' failure to file claims of their liens on the Liberian Registry in New York, a relatively simple and inexpensive means of giving notice, evinces a failure of the lienors to exercise the requisite degree of diligence.

Several cases have treated failure to record a claim of lien as a relevant factor in assessing the equities of a laches defense. *See, e.g., Tagaropulos, S.A. v. S.S. Santa Paula*, 502 F.2d 1171, 1172 (9th Cir. 1974);

John W. Stone Oil Distributor, Inc. v. M/V Miss Bern, 663 F. Supp. 773, 780 (S.D. Ala. 1987); *Dixie Machine Welding and Metal Works, Inc. v. M/V Andino*, 1983 A.M.C. 1166, 1168 (S.D. Fla. 1982); *Waterways Marine, Inc. v. Brooks Liquid Transport, Inc.*, 291 F. Supp. 703 (N.D. Ill. 1968). Each case, however, has its own set of facts and no situation directly parallels the one before us.

All parties agree that there is no statutory requirement that a maritime lien be filed in order to be valid.[3] At the time Congress enacted the Maritime Liens Act, it could have but failed to require filing. It has made no attempt to change the statute in this respect since then. The district court thus concluded that the lienors here did not lack diligence "*merely* because the claims were not filed with the Liberian Ship Registry in New York." App. at 376 (emphasis added). Obviously, however, the ability to have filed the lien is a consideration that cannot be completely ignored in the relevant balancing. It is significant whether it was a custom of the industry to record liens for necessaries.

Poised against the diligence or lack thereof of the lienor is the action of the purchaser of the vessel. A balancing of the equities requires consideration not only of the bona fides of the purchaser, *i.e.*, its lack of actual knowledge of unpaid liens and its search of the ship's registry, but also of its efforts to ascertain whether, in light of the absence of any legal requirement of filing liens, there are in fact liens outstanding. *See Tagaropulos S.A. v. S.S. Santa*

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3. Appellant is somewhat disingenuous in its various references to the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, April 10, 1926, 120 L.N.T.S. 187. The significant fact is that the United States is not a signatory, and thus the provisions of the Convention are irrelevant to this case.

Paula, 502 F.2d 1171, 1172 (9th Cir. 1974) (Purchaser "made every effort to unearth all claims against the ship." It checked both the home port and ship's log for liens; although no liens were entered in the log, purchaser discovered entries for repairs, contacted shipyards and learned of outstanding unpaid bills).

Finally, we note that it is for the district court in the first instance to perform the equitable balancing of all the relevant factors. Our review will be facilitated if the district courts fully discuss the factors considered on the issue of diligence and make explicit their balancing of the equities in reaching a decision on laches. We thus proceed to examine the record to discern the factors which explicitly or implicitly informed the district court's judgment in this case.

C.

An exhibit introduced in evidence shows that the vessel was not in a United States port during the entire period from October 21, 1982 until April 2, 1983.[4] The

4. The itinerary of the vessel from May 1, 1982 through April 1983 was as follows:

Time in Port	*Port*
1982	
Apr 27 - May 12	New Orleans
May 13 - May 23	Houston [Port's services]
May 28 - May 29	Charleston [Semco's services]
May 30 - May 31	Hampton Roads
Jun 11	Gibraltar
Jun 14 - Jun 17	Malta
Jun 18 - Jun 19	La Goulette, Tunisia
Jun 22 - Jul 3	Alexandria
Jul 6 - Jul 7	Malta
Jun 11	Gibraltar
Jul 24 - Aug 7	New Orleans [Ryan-Walsh's services]
Aug 9 - Aug 14	Houston [Port's services]
Aug 29 - Sep 1	Casablanca

appellees learned of Uiterwyk's bankruptcy proceeding shortly after it was commenced, and they acted to enforce their liens within days of the vessel's subsequent return to United States waters. The initial inquiry relevant to appellees' diligence is thus whether they had a reasonable opportunity to enforce their liens between the time each lien arose and October 21, 1982, when the ship left United States waters.

Patently, Port could not have taken any action in United States waters to enforce its third lien, that based on the services it provided between October 14-20, 1982, because the vessel left the United States immediately thereafter. Semco and Ryan-Walsh, on the other hand, had provided their services earlier. However, throughout the entire period following the services provided by Semco in Charleston (May 27 and 28) and by Ryan-Walsh in New Orleans (July 26 - August 6), the vessel was out of the country except for two Houston stops (August 9-14 and October 14-21)

Sep 2 - Sep 3	Tangier
Sep 10	Alexandria
Sep 18 - Sep 22	Malta
Sep 25	Gibraltar
Oct 9 - Oct 14	Port Arthur, Texas
Oct 14 - Oct 21	Houston [Port's services]
Nov 5 - Nov 10	Casablanca, Morocco
Nov 11	Gibraltar
Nov 12	El Djazair
Nov 18 - Dec 1	Alexandria, Egypt
Dec 3 - Dec 17	Piraeus, Greece
Dec 28 - Dec 30	Dunkirk, France
1983	
Dec 31 - Jan 5	Rotterdam, Netherlands
Jan 19	Las Palmas, Canary Islands
Jan 27	Abidjan, Ivory Coast
Jan 29	Abidjan
Mar 5	Abidjan
Apr 2 - Apr 14	Philadelphia, Pennsylvania

and one stop at Port Arthur, Texas (October 9-14). If we look to the vessel's return to the particular port where the stevedoring company provided the services, which was the dispositive factor leading the court to determine that laches did not bar one of the claims in the second *Everosa* case, 20 F. Supp. at 13, we note that the vessel did not return to Charleston or New Orleans following the provision of services by Semco and Ryan-Walsh at these ports.

We are aware, as appellant argues, that modern technology associated with the shipping industry has made it easier than in the *Everosa* period for lienors to track ships, thus increasing opportunities to arrest vessels and enforce liens. Nonetheless, we cannot rule on the record developed by the appellant here that the stevedore companies had the obligation to track the vessel, which primarily served foreign ports throughout this entire period, to the Texas ports and arrest the ship on one of the three occasions when it would have been possible to do so.

It is true, as appellant argues, that these companies could have easily filed their liens on the ship's registry and thereby given notice to a prospective purchaser. However, we have pointed out that there is no legal requirement for such an action and, significantly, there was no evidence of an industry custom to do so. In fact, appellant's expert, although testifying that he advises his clients to record their liens, conceded that "as a practice and custom . . . there are claims for which liens have not been registered." App. A at 353.

Appellant notes that there is evidence signifying that at least some of the appellees knew of Uiterwyk's poor financial condition.[5] Appellant, however, has

5. For example, a Ryan-Walsh memorandum dated September 1, 1982, refers to rumors that Uiterwyk is about to take a "swan dive" and that it should "perhaps consider doing something before

produced no evidence that appellees were actually aware of the impending bankruptcy or the forthcoming sale of the vessel at a time when they still had opportunities to execute on their liens. Appellees' failure to enforce the liens was consistent with their past practice in dealing with Uiterwyk, which was a slow payer. Previously, their demands for payment and threats to arrest vessels were sufficient to procure payment, albeit belatedly. Appellant has not shown it was commercially unreasonable of appellees to wait for payment. In light of these circumstances, we find no basis to question the district court's conclusion that these lienors exercised the requisite diligence with respect to their liens and that Port exercised such diligence with respect to its October lien.[6]

It is more difficult to evaluate Port's diligence in the case of its two earlier liens, that arising from its May services and that arising from its August services. Port clearly had the opportunity to take action against the ship because it returned to Houston where Port provided additional services notwithstanding the unpaid bills. In both instances Port extended further credit for new services.

However, Port's liens were only five months and two months old at the time the ship left United States waters. In many of the relevant cases the liens had been outstanding for substantially over a year before the lienor sought enforcement. *See Tagaropulos, S.A. v.*

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the dam bursts." App. B at 15. Uiterwyk checks to Semco bounced in September and October 1982. App. A at 153-56.

6. At one point in its opinion the district court stated that appellees promptly pursued their maritime liens upon learning of Uiterwyk's bankruptcy proceeding. It is clear from the next sentence, where the court noted that the vessel was arrested within six to eleven months of the stevedoring services rendered by the plaintiffs, App. A at 375, that the court in fact examined diligence from the standpoint of the entire relevant period.

S.S. Santa Paula, 502 F.2d 1171, 1172 (9th Cir. 1974) (two years); *Phelps v. The Cecelia Ann*, 199 F.2d 627, 628 (4th Cir. 1952) (more than two years); *The John Cadwalader*, 99 F.2d 678, 679 (3d Cir. 1938) (five to nine years); *Dixie Machine Welding and Metal Works, Inc. v. M/V Andino*, 1983 A.M.C. 1166 (S.D. Fla. 1982) (two and one-half years).

Appellant has shown little that Port could have done short of the draconian measure of arresting the ship, with the exception of filing the lien which we have noted is not required as a matter of law. Appellant introduced no evidence of other commercially reasonable practice available to Port. Port's Vice-President testified that it was not customary for Port or any other stevedoring company to require advance payment before it rendered services. App. A at 261. Moreover, Port was receiving payments from Uiterwyk through 1982. While it did not receive any payment which was applied to the invoices for this particular vessel, it did receive $100,000 from Uiterwyk on November 10, 1982 which was applied to older bills, App. A at 264, thus giving it reason to believe that it would eventually be paid. Therefore, we cannot conclude that Port was guilty of a lack of diligence that would deprive it of its maritime lien.

Under these circumstances, we need not consider whether there were some steps that Star, a sophisticated shipowner which purchased over 70 vessels, could have taken to protect itself which it failed to take, such as the inquiry of the general agent or of the port agents and suppliers in the ports that the vessel had visited. *See Tagaropulos*, 502 F.2d at 1172.

It was the function of the district court to make the balance between the actions of the lienors and the new purchaser. In the few cases that have reached a court of appeals, the appellate courts have tended to rely on the trial court's judgment. *See, e.g., Tagaropulos*, 502

F.2d at 1171; *Phelps v. The Cecelia Ann*, 199 F.2d 627 (4th Cir. 1952); *see also Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30 (1951) (issue of laches is one primarily addressed to the discretion of the trial court). Although it is possible that we would not have decided the issue as did the district court, we cannot hold that it abused its discretion in balancing the equities as it did in concluding that these claims were not barred by laches.[7]

IV.

NECESSARIES

Under the Maritime Liens Act, a lien is provided for "[a]ny person furnishing . . . *necessaries*, to any vessel." 46 U.S.C. § 971 (emphasis added). The term "necessaries" has been interpreted broadly to include all services which will facilitate operation of ships. *See Farwest Steel Corp. v. Barge Sea-Span 241*, 769 F.2d 620, 623 (9th Cir. 1985) ("[t]he term 'necessaries' under section 971 refers to 'supplies which are necessary to keep the ship going,'" quoting *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 280 (1940)); *Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91, 92-93 (1st Cir. 1982).

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7. In light of the strong presumption in favor of maritime liens, appellant has not met its burden of proving that appellees deliberately intended to waive their statutory rights to such liens. *See* Gulf Oil Trading Co. v. M/V Caribe Mar, 757 F.2d 743, 750 (5th Cir. 1985); Farrell Ocean Services, Inc. v. United States, 681 F.2d 91, 93-94 (1st Cir. 1982). Thus, the district court's finding that appellees did not waive their liens is not clearly erroneous.

We also reject appellant's contention that the claims filed by the appellees as unsecured creditors in the bankruptcy proceeding against Ulterwyk Corp., the general agent, operated to release the maritime liens that the appellees held against the ship. Although we would be concerned were there a double recovery, we were advised at oral argument that there has been no distribution in the bankruptcy proceeding.

Stevedoring services have generally been treated as necessaries within the meaning of section 971, *see, e.g., Universal Shipping, Inc. v. Panamanian Flag Barge*, 563 F.2d 483 (1st Cir. 1976), and appellant acknowledges that stevedoring services give rise to a maritime lien. It argues, however, that some of the charges on appellees' invoices are not "necessaries". Specifically, it objects to "charges for overtime, container royalties, Guaranteed Annual Income contributions, vacation, pension and welfare portions of charges for labor, extra labor for truck drivers, moving containers, and commissions for soliciting freight" on the ground that these charges do not relate to services actually provided to the vessel. Appellant's Brief at 45.

It is undisputed that most of the items to which appellant objects represent payments which the stevedoring companies are required to make to the stevedores under the applicable collective bargaining agreements. As such, they are part and parcel of the cost of stevedoring services and are passed on to the owner of a vessel. It is an economic fact of life on the waterfront that if these payments are not made, the vessel will be unable to obtain the stevedoring services which are required for the operation of any cargo bearing ship. *See Atlantic and Gulf Stevedores, Inc. v. M.V. Rosa Roth*, 587 F. Supp. 1033, 1035 (S.D.N.Y. 1984). Therefore, we hold that the maritime lien for necessaries under 46 U.S.C. § 971 encompasses those payments covered by the vessel's contract for services which stevedoring companies must pay to the stevedores pursuant to the terms of a collective bargaining agreement.

In this case, the district court required payment of additional items which are not covered by a collective bargaining agreement. Semco's claim includes $2,687.10 in manifest and booking commissions for

services performed by Semco as its agent in procuring cargo and collecting freight charges. We need not decide whether cargo itself is a necessary under section 971, *see The Majestic II*, 285 F. 91 (S.D. Fla. 1922) (supplier of cargo for resale did not have maritime lien against vessel which carried the cargo), because we believe that in any event it is unreasonable to include commissions for solicitation of freight and provision of financial services as necessaries. *Accord E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 663 (11th Cir. 1987). Such commissions are outside the realm of stevedoring maritime contracts and cannot be the subject of a maritime lien.

The support documents for Semco's claim also included a bill for $160.00 for moving chassis, which are the frames used to move large shipping containers around pier areas. Use of chassis in connection with loading cargo on and off vessels has been held to be a necessary giving rise to a maritime lien. *See Itel Containers International Corp. v. Atlanttrafik Express Service, Ltd.*, 668 F. Supp. 225, 229 (S.D.N.Y. 1987) (chassis leased in excess of those actually used on board ship were necessaries within meaning of § 971). In this case, however, Semco's own witness testified that the bill in question was just for moving chassis and had "nothing to do with stevedoring." App. A at 124. To the extent this component of Semco's claim and any other components of the other appellees' claims represent charges for movement of chassis for purposes not directly related to loading or unloading the vessel, they are not necessaries giving rise to maritime liens.

It is unclear from the record before us whether there are additional items of the asserted claims which were not required by the collective bargaining agreement or which were not necessary to facilitate the use of the vessel. On remand, the district court should

adjust any amount which is not consistent with the above analysis. We assume the parties can agree on these issues, but if they fail to do so, the district court may conduct such additional proceedings as required.

V.

PREJUDGMENT INTEREST

Appellant contends that the district court abused its discretion in awarding prejudgment interest. The award of prejudgment interest in admiralty cases for compensatory purposes is within the trial judge's discretion, and we have held that such interest is to be denied only in exceptional circumstances. *See In re Bankers Trust Co.*, 658 F.2d 103, 108 (3d Cir. 1981), *cert. denied*, 456 U.S. 961 (1982). Appellant has not pointed to any exceptional circumstances such as bad faith by the appellees or delay in prosecution of their claims which would preclude such an award. *Id.* We find no abuse of discretion in this respect in the award of prejudgment interest.

VI.

CONCLUSION

We recognize that it may appear inequitable to permit enforcement of maritime liens against a purchaser without notice of those liens, particularly when giving notice through registration of the liens is a simple matter. However, whether such registration should be imposed as a requirement for the ability to satisfy liens against a ship when it has been acquired by a subsequent purchaser is a policy decision that is more appropriately made by Congress than by the courts. The judicial decision on a laches defense must be made without interposition of our view as to what the law should be.

In this case, we cannot say that the outstanding liens were so long overdue that, in the circumstances here, the district court was obliged to hold that they could not be enforced. We will, therefore, defer to the district court's exercise of its discretion, and we will affirm its judgment in all respects except that we will remand for the purpose of its reconsideration of the items which may appropriately be considered as necessaries under the Maritime Liens Act in accordance with our discussion above.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOUTHEASTERN MARITIME COMPANY, PORT STEVEDORING COMPANY, INC., RYAN-WALSH STEVEDORING COMPANY,INC.	:	CIVIL ACTION
vs.	:	
M/V LITSA (Ex.LAURIE U) IN REM	:	NO. 83-1614

ADJUDICATION

GREEN, J. APRIL 13, 1988

After a nonjury trial of the three remaining claims filed against the M/V Litsa, owned by Star Warrant Shipping Company ("Star"), I make the following:

FINDINGS OF FACT

1. On December 8, 1982, Star purchased and received delivery of a vessel known as the M/V Laurie U from its owner Uiterwyk Lines, Ltd., a Liberian company. Star conducts its business in Greece. A search of the Liberian ship registry in New York did not disclose any claims or maritime liens filed against the vessel,

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and in fact none of the claims and liens asserted herein were filed in the Liberian registry. At time of sale said vessel was in the port of Piraeus, Greece. Star did not know prior to purchase of the vessel of any of the liens asserted by intervening plaintiffs.

2. On or about April 6, 1983, said vessel, then named the M/V Litsa, was arrested in the port of Philadelphia. Said arrest was in accordance with Rule C of the Supplemental Fed. R. Civ. P.

3. On or about April 8, 1983, Southeastern Maritime Company ("Semco") was granted leave to intervene as a plaintiff in this action pursuant to petition filed.

4. On April 8, 1983, Port Stevedoring Company, Inc. ("Port") was granted leave to intervene as a plaintiff in this action, pursuant to petition filed.

5. On April 12, 1983, Ryan-Walsh

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Stevedoring Company ("Ryan") was granted leave to intervene as a plaintiff in this action, pursuant to petition filed.

6. The claims asserted by Semco, Port and Ryan are for stevedoring services, provided to the M/V Laurie U prior to its change of ownership. The lien claims are based upon the Federal Maritime Lien Act, 46 U.S.C. § 971 et seq.

7. All of the stevedoring services rendered by intervening plaintiffs were performed pursuant to contracts with Uiterwyk Corporation, the general agent and operator of said vessel. No contractual relationship exists between the intervening plaintiffs and Star, the present owner.

8. Since approximately 1973 Semco also acted as local special agent on behalf of Uiterwyk Corporation at the port of Charleston, South Carolina but

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not as general agent of the vessel.

9. All of the intervening plaintiffs pursued and sought payment from Uiterwyk Corporation, however, none of the intervening plaintiffs intended to waive lien rights and, in fact, none of intervening plaintiffs did.

10. Semco learned on approximately January 27, 1987 that Uiterwyk Corporation had filed a petition in bankruptcy. Semco promptly requested the Lloyd's of London watch service to advise as to the position, new name and/or new owner of the M/V Laurie U. There is no evidence that Semco knew prior to January 27, 1983 of any change in ownership of the M/V Laurie U.

11. Uiterwyk Corporation was the general agent for the vessel, not Semco. Semco has a valid maritime lien for the necessaries furnished to the M/V Litsa. The evidence of record establishes that

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Semco acted with extraordinary diligence in pursuing its claim. Semco is not guilty of laches or other inequitable conduct that would defeat Semco's reduced claim in the amount of $22,184.87 in whole or in part.

12. Between July 26 and August 6, 1982, in the port of New Orleans, Ryan performed stevedoring services on the M/V Laurie U to the amount of $25,404.21.

13. In the port of Houston, Texas, Port serviced the M/V Laurie U as follows: between May 13 and May 23, 1982, services were rendered in the amount of $112,994.71; between August 11 and August 14, 1982, services were rendered in the amount of $46,692.26; between October 14 and October 20, 1982, services were rendered in the amount of $71,873.97 for a total of $231,560.94.

14. Ryan and Port have valid maritime liens for the necessaries furnished

to the M/V Litsa. The evidence of record establishes that Ryan and Port acted with extraordinary diligence in pursuing their claims. Ryan and Port are not guilty of laches or inequitable conduct that would defeat their claims in whole or in part.

15. Star's counterclaim asserted against intervening plaintiffs for unlawful arrest of the vessel is not supported by the evidence.

DISCUSSION

The evidence clearly reveals that all of the liens are asserted for stevedoring services provided to the Laurie U while in United States ports. Said services were rendered between May 13, and October 20, 1982 by Port, between July 26, and August 6, 1982 by Ryan and between May 27-28, 1982 by Semco. Expenses incurred by the stevedores for support services, and labor fringe

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benefit costs are properly included as "necessaries" under the Federal Maritime Lien Act. See TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta, 696 F. 2d 1135, 1138 (5th Cir. 1983); Universal Shipping, Inc. v. Panamanian Flag Barge, 563 F.2d 483, 484 (1st Cir. 1976).

The evidence further discloses that the Laurie U was in the United States port of Houston, Texas on October 14 to 21, 1982 and, thereafter, was not in a United States port until April 2, 1983. At the time of the ship's sale and delivery to the new owner on December 8, 1982, it was anchored in the port of Piraeus, Greece. The maritime liens asserted by intervening plaintiffs were promptly pursued upon learning of the bankruptcy proceedings involving Uiterwyk Corp. and within days of the Laurie U's return to a United States port. The arrest of the vessel in Philadelphia and

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the filing of intervenors' complaints in this action occurred within six to eleven months of the rendering of all stevedoring services by said plaintiffs.

It is true that between October 20, 1982, when the Laurie U departed from the United States port in Houston, Texas, and April 2, when it returned to a United States port in Philadelphia, the intervening plaintiffs had the capacity to track the ship and to know its whereabouts in foreign ports. However, the arrest of the vessel in a foreign port is not required to preserve a lien under the Maritime Lien Act. See G. Gilmore and C. Black, The Law of Admiralty, at 767 (2d ed. 1975).

Thus, I conclude that the intervening plaintiffs exercised the extraordinary high degree of diligence required to preserve and enforce the maritime liens herein asserted. I also

conclude that there was no failure to exercise the extraordinary high degree of diligence merely because the claims were not filed with the Liberian Ship Registry in New York. Obviously, registration would have given notice of intervening plaintiffs' liens to a prospective purchaser. However, such notice is not required as a matter of law and the failure to give such notice is neither probative of an intention not to acquire a lien nor of an intention to waive the lien. See Piedmont and George's Creek Coal Company v. Seaboard Fisheries Company, 254 U.S. 1, 12 (1920) ("The maritime lien is a secret one. It may operate to the prejudice of mortgagees or of purchasers without notice."); Layton Industries, Inc. v. Sport Fishing Cruiser Gladiator, 263 F. Supp. 356, 359 (D. Mass. 1967).

The ship owner Star contends that

the claims are grossly inequitable. Star also argues that the claims should be dismissed for laches. The evidence, however, does not establish inequitable conduct as claimed by Star. The fact that plaintiffs sought payment from Uiterwyk Corporation, the general agent, filed claims against the general agent and participated in bankruptcy proceedings involving the general agent simply is not probative of inequitable conduct. Certainly, intervening plaintiffs were entitled to claim against the general agent without relinquishing their lien claims against the vessel. Moreover, they did not sleep on their rights. As soon as claimants received notice of the bankruptcy proceeding against the general agent, promptly moved to locate, track and arrest the vessel when it next returned to a United States port. Intervening plaintiffs actively pursued col-

lection of their claims and at no time acted inequitably or to the prejudice of the new ship owner.

Accordingly, intervening plaintiffs' liens remain intact and they are entitled to recover from the owner of the vessel the amounts due for stevedoring services rendered to the vessel plus prejudgment interest.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter of this maritime litigation and the causes of action are based upon Federal Maritime Lien Act.

2. Intervening plaintiffs, Semco, Port and Ryan, have maritime liens under the Federal Maritime Lien Act, 46 U.S.C. § 971, by virtue of their supplying necessaries to the arrested vessel pursuant to contract with the vessel's then general agent. Universal Shipping v. Panamanian Flag Barge, supra.

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3. An action in rem to enforce the maritime liens has been timely brought pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, and a full bench trial provided to the parties.

4. Federal law did not require intervening plaintiffs to file any notice of claim or lien with the Liberian Registry.

5. There was no lack of extraordinary diligence by the intervening plaintiffs in asserting the liens and no prejudice to defendant resulted from repeated attempts to collect from Uiterwyk, Corp.

6. There are no exceptional circumstances that would make prejudgment interest inappropriate and, accordingly, compensatory prejudgment interest from intervention to date will be awarded at 8% per annum, which approximates the

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prevailing rate of interest in Pennsylvania at the relevant time. See Matter of Bankers Trust Co., 658 F.2d 103, 108 (3d Cir. 1981), cert. den. 456 U.S. 961 (1982). Thus, interest will be awarded to intervening plaintiffs as follows:

Semco	$8,893.38
Ryan	10,183.95
Port	92,624.37

7. Intervening plaintiffs are entitled to judgment on the counterclaim asserted by defendant.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOUTHEASTERN MARITIME COMPANY, PORT STEVEDORING COMPANY, INC., RYAN-WALSH STEVEDORING COMPANY, INC.	:	CIVIL ACTION
vs.	:	
M/V LITSA (Ex. LAURIE U)-IN REM	:	NO.83-1614

JUDGMENT

AND NOW, this 13th day of April, 1988, IT IS ORDERED that judgment is entered in favor of Southeastern Maritime Company on its claim and against defendants in the amount of $31,078.28, including prejudgment interest to date.

IT IS FURTHER ORDERED that judgment is entered in favor of Ryan-Walsh Stevedoring Company, Inc. on its claim and against defendants in the amount of $35,588.16, including prejudgment interest to date.

IT IS FURTHER ORDERED that judgment is entered in favor of Port Stevedoring

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Company, Inc. on its claim and against defendants in the amount of $324,185.31, including prejudgment interest to date.

IT IS FURTHER ORDERED that judgment is entered in favor of Southeastern Maritime Company, Ryan-Walsh Stevedoring Company, Inc. and Port Stevedoring Company, Inc. and against defendant on defendant's counterclaims.

BY THE COURT:

/s/ Clifford Scott Green, J.
CLIFFORD SCOTT GREEN, J.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1362

BERMUDA EXPRESS, N.V. SOUTHEASTERN MARITIME COMPANY, PORT STEVEDORING COMPANY, INC., RYAN-WALSH STEVEDORING COMPANY INC., NRS FINANCIAL CORP., ASSIGNEE OF MALONE MARINE GROUP, INC., ZALESKY, MARVIN d/b/a SEASIDE MARINE SUPPLY OF HOUSTON, CHARLES L. MOLHO, d/b/a MANHATTAN SHIP SUPPLY AND THURMOND SUPPLY CO., INC.,

vs.

M/V LITSA (ex. LAURIE U)
IN REM

M/V LITSA (Ex. LAURIE U),
Appellant

(D.C.Civil No. 83-1614)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SLOVITER and BECKER, Circuit Judges and BARRY, District Judge*

JUDGMENT

This cause came on to be heard on

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*Hon. Maryanne Trump Barry, United States District Court for the District of New Jersey, sitting by designation.

Appendix C

the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 6, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 14, 1988, be, and the same is hereby affirmed in all respects except insofar as the matter is remanded to the said District Court for reconsideration in accordance with the opinion of this Court of the items which may appropriately be considered as necessaries under the Maritime Liens Act.

ATTEST:

/s/ Sally Mrovos

Clerk

April 13, 1989

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1362

BERMUDA EXPRESS, N.V., et al.

v.

M/V LITSA,

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, Circuit Judges, and BARRY, District Judge*

The petition for rehearing filed by M/V LITSA, appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

*Hon. Maryanne Trump Barry, United States District Court for the District of New Jersey, sitting by designation.

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/
Circuit Judge

Dated: May 9, 1989